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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 632.

NEW ORLEANS SHIPWRECKING CORPORATION, *Petitioner*,

vs.

WILLMIAM W. SMITH, GRENVILLE MELLON, RICHARD PARKHURST, RAYMOND McKEOUGH, and JOSEPH K. CARSON, JR., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, a Louisiana corporation, respectfully shows:

STATEMENT OF THE CASE.

On January 30, 1948, petitioner brought its complaint in the United States District Court for the District of Columbia praying that respondents, as duly qualified mem-

bers of the United States Maritime Commission, be enjoined and restrained from carrying into effect a purported illegal and unauthorized cancellation of a certain award and sale to petitioner of certain surplus LST ships, from readvertising the ships for sale, reselling or delivering them and for general relief. (R. 2-6)

A temporary restraining order was granted upon the filing of the complaint. Petitioner duly moved for a temporary injunction. Respondents moved to dismiss the complaint or, in the alternative for summary judgment. (R. 7). On February 13, 1948, the District Court after oral argument, denied all motions, and recorded an opinion later followed by the trial court. (R. 9-11)

Respondents then answered, admitting that on September 17, 1947 and on October 29, 1947, the United States Maritime Commission published invitations to bid, offering numerous vessels for sale; that petitioner submitted bids on certain vessels together with an appropriate bond as required by the Commission and that upon the opening of the bids, petitioner was found to have been the highest bidder on nineteen of the vessels. The answer also admitted that on January 22, 1948, The Maritime Commission met, voted and decided that awards be made to petitioner on fifteen of the nineteen vessels, saying that as to four vessels the bids were rejected. (R. 8)

Respondents also admitted that, as petitioner alleged in Paragraph 12 of the complaint, on Friday, January 23, 1948, respondents met and *attempted to reconsider* the decision awarding the plaintiff the ships as aforesaid and also *attempted to reverse the action* of January 22, 1948, relative to the sale of the ships to the plaintiff, but further said that respondents *did rescind* their action awarding the sale of such ships to petitioner. (Emphasis supplied) (R. 8)

On March 15, 1948, the parties stipulated that the bids for the four ships were rejected at the time the Commission awarded or approved the sale of 15 other vessels as stated in the complaint, signing the stipulation at a pre-

trial hearing. The court, at the pre-trial hearing also made a statement of the law, adopting the oral opinion of the court at the hearing of the motions above referred to. The minutes of the meetings of the Maritime Commission of January 22 and January 23, 1948, were stipulated into evidence. (R. 12, 13).

After a hearing on the merits, and after considering the pleadings, evidence and argument of counsel, the trial court rendered an opinion incorporating the law as stated in the opinions of the judges at the hearings of the motions and at pre-trial procedure, and the same was entered on March 22, 1948. (R. 13, 14) Thereafter, the trial court filed its findings of fact and conclusions of law and entered judgment ordering the complaint dismissed on April 13, 1948. (R. 14-17).

Notice of appeal was filed on May 12, 1948 and bond was duly posted the following day.

The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the lower court, rendering an opinion with one judge dissenting on December 13, 1948. (R. 80-82)

THE FACTS.

As may be seen from the review of the allegations of the complaint and the admissions in the answer, above referred to, this cause centers upon the validity or invalidity of the award made by the United States Maritime Commission on January 22, 1948, and upon the validity or invalidity of the action of the United States Maritime Commission on January 23, 1948, purporting to rescind that award.

At the hearing the following facts developed:

1. The two invitations to bid were identical, save for the identity of the vessels offered for sale, the dates or issue and the dates for the opening of the bids. Both invitations offered the vessels for sale and prescribed terms and conditions, requirements and restrictions for the bidding which

were identical. The terms and conditions of sale were captioned: "Information and Instructions to Bidders" and comprise twelve printed pages of the record. (Plaintiff's Exhibit 1, R. 52-64).

2. Important and essential terms and conditions for bidding included the following:

a. Bids were required to be submitted on the form provided by the Maritime Commission and attached to the invitation to bid. (Plaintiff's Exhibit 1; R. 54; R. 67, 68)

b. Bids were required to be accompanied with either a guaranty of 25 per cent of the amount bid, (certified or cashier's check) or by a bond satisfactory to the Commission, to insure compliance with terms of the bid. (Plaintiff's Exhibit 1; R. 54)

c. Bids could not be withdrawn after the time fixed for opening. (Plaintiff's Exhibit 1; R. 56)

d. The Commission reserved the right to reject any and all bids. (Plaintiff's Exhibit 1; R. 56)

3. The form for bidding provided by the Commission (see 2 a above) required filling in only of blanks identifying the bidder and the invitation, the vessels and the respective prices bid, and the signature of the bidder. (R. 67, 68).

4. Petitioner duly submitted bids, pursuant to the invitations, (R. 19), and furnished bonds in the amount of $1,073,000.00 (R. 20). Respondents by their attorney, in reply to a question from the trial court, admitted there was no question raised as to the insufficiency of the bond. (R. 21).

5. Upon accepting the bids on January 22, 1948, the Commission issued the following direction:

> "The proper officers of the Commission were authorized and directed to take any and all actions necessary to carry the action of the Commission as above set forth fully into effect." (R. 75). (Minutes of Commission meeting of January 22, 1948.)

6. Though it was normally the function of the Secretary of the Commission to dispatch telegrams of notification to successful bidders, the Secretary in this instance took no such action. (R. 34). *He* decided not to act, because an individual Commissioner suggested to him that no formal notice be sent, since that Commissioner intended to seek a reconsideration of the action. This suggestion occurred after the Commission meeting had been adjourned. (R. 34, 35).

7. Between the time of the adjournment of the meeting of January 22, 1948 and before the meeting of the Commission on January 23, 1948, one Nathan Siegel, an agent for petitioner, having heard that the awards had been made, made inquiries if the Commission's Large Vessels Sales Division and of the Secretary whether this was so. At the Large Vessel Sales Division, on January 22, 1948, Siegel testified, he learned that petitioner had been awarded the vessels on which it was high bidder. At the Secretary's office, on the same date, having told the Secretary of the information he got at the Division of Large Vessel Sales, he inquired if the awards which had been held up so long had been made and was told by the Secretary: "Yes, they have been made and I am glad the matter has been finally disposed of." (R. 26, 27). On the morning of January 23, 1948, Siegel again visited the offices of the Division of Large Vessel Sales, asked if the telegram of notification to petitioner had been written and was told by a stenographer: "I am writing it now." (R. 27). The above is based upon testimony of Siegel.

As to the truth of the information, no attempt was made to deny the same at the trial—that is that the awards had been made as learned by Siegel at the time (except for the four vessels on which petitioner was high bidder and which, according to the answer, were not awarded) and officials and employees of the maritime Commission were vague in their testimony respecting matters about which Siegel was definite. Thus, a Mr. Carter, in the Division of Large

Vessel Sales did not recall whether he talked to Siegel "on January 22 or January 31" adding that "he and five hundred others are in and out all day long", but admitting that it was within the range of possibilities that he had talked to Siegel on January 22. Carter did not recall discussing the Commission action with him then and denied that he told Siegel petitioner had been awarded certain bids. (R. 44). Petitioner here concedes that the Secretary and all other officials to whom Siegel testified he talked about the bids declared they did not know of Siegel's connection with petitioner as an agent at the time.

Siegel, after his visit to the Division of Large Vessel Sales on the morning of January 23, sent a telegram to petitioner informing petitioner that he had learned the awards had been made to petitioner. (R. 27, 73).

8. The trial court took judicial notice of a regulation published in the Federal Register of September 11, 1946, at the request of respondents to show that the "Office of the Secretary is responsible for appropriate notification of Commission actions." (R. 49, 50). The same regulation provides that inquiries concerning awards of LST vessels to be sold for scrapping or otherwise be directed to the Division of Large Vessel Sales, and that the sales are made by Commission action on recommendations of this division. (11 F. R. 177A-594). This second excerpt was not brought specifically to the attention of the trial court. (It was to the Court of Appeals).

9. On January 23, 1948, at a special meeting of the Maritime Commission which commenced at 3:30 p.m., Commissioner Mellen moved for reconsideration of the action of January 22, with respect to LST's pointing out that the bids in many cases were as much as $10,000 below other bids for LST's and that offers had been made for purchase of LST's for use as non-self propelled barges. The Commission voted to reconsider. After further discussion, by the "yea" votes of three Commissioners, the Commission

"rescinded" its action of January 22, 1948. (Proceedings of the United States Maritime Commission, minutes of special meeting of January 23, 1948; R. 77).

OPINIONS BELOW.

While the opinions below are not yet reported in book form they are in the record as designated.

Trial Court: Oral but recorded opinion on motions, February 13, 1948, (R. 9) by District Judge Holtzoff; Memorandum at pre-trial hearing March 15, 1948, (R. 12) by District Judge Schweinhaut; opinion of trial judge, March 22, 1948, (R. 13) by District Judge Bailey.

The case was decided in the trial court on the issue as to whether the action of the Commission of January 22, 1943, resulted in the consummation of a binding agreement, and that issue was resolved by a finding that it did not so result because the Secretary of the Commission was the only authorized officer of the Commission who could notify petitioner of the acceptance of the bid, and who did not "knowingly" do so, so that the essential requirement of a bilateral contract that manifestation of assent or communication of acceptance of the proposal or offer was lacking. (R. 13-17).

Court of Appeals: The Court limited its consideration of the case to the sole point as to whether a contract existed by reason of the Commission action of January 22, 1948, in the face of the failure of the Secretary of the Commission to send a notification of acceptance, and affirmed the judgment on this ground, ignoring in its opinion the points and authorities on other grounds presented by petitioner (which will be referred to hereinafter). (R. 80, 81). The Court of Appeals entered judgment on the same day as the opinion issued, December 13, 1948. (R. 82).

PETITIONER'S CONTENTIONS BELOW.

In the Court of Appeals, petitioner urged the following points:

1. Notification by the Secretary of the Commission was a mere procedural matter and not a substantive element of contract because the contract was made when the Commission accepted the high bids of the petitioner and entered its action in records available for public inspection.

2. The published procedure of the Maritime Commission directed the public, when making inquiries concerning the award of bids for LST's to the Division of Large Vessel Sales and therefore the requirement of the trial court that notice be obtained from the Secretary of the Commission, and only from him, was erroneous. Petitioner urged in support of this contention the provisions of Section 3 of the Administrative Procedure Act of 1946, (60 Stat. 238; Title 5, U. S. Code, Sec. 1002), wherein Congress provided that no person should be required to adopt a procedure to obtain information from a government agency other than the procedure published by the agency, pursuant to that law.

3. Petitioner contended that equity forbade the validation of the decision of the Commission to rescind its awards as a decision repugnant to equity and fair dealing.

4. Petitioner relied upon the doctrine espoused by this Court in *United States* vs. *Purcelle Envelope Co.* (249 U. S. 313), and the requirements governing competitive bidding and consummation of contracts with the United States as set forth therein. On the strength of the *Purcelle* case, petitioner contended that the time of deliberation and discretion ended for the Maritime Commission when it availed itself of the reserved alter-

nate to accept—and not reject—the bids of the petitioner on January 22, 1948, and entered its decision in official records, thereby consummating a contract which could not be arbitrarily rescinded, or set aside in the hope that greater profit would result from the repudiation of its officially recorded acceptance and obligation.

5. Petitioner also contended that the requirements of the Administrative Procedure Act of 1946 (*supra*), (whereby Congress directed government agencies to make public or make available for public inspection the records of official action) resulted in constituting the Commission's acceptance of petitioner's offers an open and overt manifestation of assent, which could not later be denied, thus making it unnecessary for the completion of the contract that a formal communication of acceptance be made to petitioner.

JURISDICTION.

Jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sec. 1254, as revised, codified and enacted into law by the act of June 25, 1948. (Public Law 773, 80th Congress, Second Session; Judiciary and Judicial Procedure.)

QUESTIONS INVOLVED.

1.

Whether the decision of the Court of Appeals contravenes and ignores the doctrine on competitive bidding and consummation of contracts enunciated by this Court in *United States* vs. *Purcelle Envelope Co.* (249 U. S. 313).

2.

Whether the direction of the Maritime Commission that its proper officers carry an award fully into effect evidenced the intent and was an attempt of the Commission

to notify petitioner of its acceptance of bids by the petitioner, constituting the manifestation of assent necessary to consummate a valid and binding contract.

3.

Whether official entry of the award in Commission records was notice to the world in general, which would include petitioner in particular, of the acceptance of petitioner's bids, in view of the provisions concerning public information in the Administrative Procedure Act of 1946. (Title 5, U. S. Code, Sections 1001 and 1002; 60 Stat. 238).

4.

Whether rescission of an award made after competitive bidding on the ground that repudiation will produce a better bargain can be countenanced by equity.

5.

Whether the Secretary of the Commission was "the only officer authorized to give notice" of awards, in view of the publication by the Commission in the Federal Register, pursuant to the Administrative Procedure Act of 1946, of a procedure directing inquiries as to awards eleswhere.

6.

Whether the provision of Section 3(a) of the Administrative Procedure Act of 1946 that no person shall be required to resort to procedure not published as required therein applies to the instant case.

7.

Whether the decision of the Court of Appeals is erroneous on its face, in this, that the decision first accepts as a fact that the Martime Commission directed its proper officers to carry its action of accepting petitioner's bids and

making certain awards fully into effect, and then decides "there is no evidence that the Commission . . . did anything that was or appeared to be intended as notice . . . of the Commission's decision to accept some of its (petitioner's) offers." (Parenthetical matter supplied).

REASONS FOR GRANTING THIS WRIT.

1. The Court of Appeals has decided a question of governmental responsibility in competitive bidding in a way that is in conflict with the decision of the United States Supreme Court on such competitive bidding in *United States* vs. *Purcelle Envelope Co.* (249 U. S. 313). (Rule 38, 5 (b).)

2. The United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance involving the rights given the public by Congress in the Administrative Procedure Act with respect to information concerning actions of government agencies and procedure to obtain information as to the same. (Rule 38, 5(c)).

3. The importance of competitive bidding for contracts with the government, and the procedure surrounding the same, bespeaks a consideration of this case in the interest of co-relating the *Purcelle* case doctrine with provisions of the Administrative Procedure Act above cited.

4. The rights of the public to information under Section 3 of the Administrative Procedure Act present a question in this case which has not but should be settled by this Court. (Rule 38, 5(b)).

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and sent to this

Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals for the District of Columbia Circuit had in the case numbered and entitled on its docket, No. 9896, *New Orleans Shipwrecking Corporation, appellant* vs. *W. W. Smith, et al., appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that judgment herein of said United States Court of Appeals for the District of Columbia Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

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IN THE

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OCTOBER TERM, 1948.

No. .....

NEW ORLEANS SHIPWRECKING CORPORATION, *Petitioner,*

vs.

W. W. SMITH, *et al., Respondents.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

The case is stated in the petition, as are references to the opinions of the courts below, and the same are hereby incorporated herein by reference and prayed to be read and considered a part hereof.

SUMMARY OF ARGUMENT.

I.

Certiorari should issue to correct the judgment of the United States Court of Appeals for the District of Columbia Circuit in a case which should have been decided in favor of petitioner upon the authority of *United States* v. *Purcelle Envelope Co.* (249 U. S. 313).

II.

Certiorari should issue to settle the question as to whether during the process of competitive bidding an officially recorded acceptance of bids by the Maritime Commission and simultaneous direction by the Commission to its proper officers to carry the action of acceptance into effect consummated a valid and binding agreement.

III.

Certiorari should issue to settle the question as to whether entry of an award in official records of a government agency comprises, in and of itself, notice of the award made, in the light of the provisions of Section 3 of the Administrative Procedure Act of 1946, with respect to public information and public records. (60 Stat. 238; Title 5, U. S. Code, Sections 1001, 1002)

IV.

Certiorari should issue to settle the question as to whether the belief that greater gain would result from repudiating an award to the highest bidder after competitive bidding for the purchase of surplus government property is a reason cognizable in equity for cancellation of the award.

V.

Certiorari should issue to settle the question as to whether evidence as to exclusive authority in the Secretary of the Maritime Commission to notify successful bidders of awards may prevail over procedure published in the Federal Register (11 FR 177A-594) pursuant to the provisions of Section 3 of the Administrative Procedure Act of 1946 (*supra*), when the published procedure specifically directed inquiries as to awards of LST vessels elsewhere.

VI.

Certiorari should issue to settle the question as to whether, in view of the specific requirement of the Administrative Procedure Act of 1946, Section 3(a) respondents were positively precluded from insisting that petitioner might only obtain notice of award of sale of LST vessels from the Secretary of the Commission when its published procedure directed inquiries as to such specific awards to the Large Vessel Sales Division of the Commission.

VII.

Certiorari should issue to settle the question of whether a government agency, once having given a direction to its officer, can avail itself of an admitted refusal of that officer to proceed in accordance with the direction, to rescind an award which would have been even formally and technically irrevocable had the officer done what he was directed to do.

VIII.

Certiorari should issue to settle the question of whether the decision of the Court of Appeals is self-contradictory.

ARGUMENT.

I.

In *United States* vs. *Purcelle Envelope Co.* the basic question was whether the Postmaster General could rescind an award previously made pursuant to competitive bidding and entered in official records, on the ground that the formal contract had not been executed and that the bond of the successful bidder had not been approved. (249 U. S. 313).

The basic question in this case is whether the U. S. Maritime Commission could rescind an award previously made and entered in official records, based upon a bid secured by a $1,000,000 bond, on the ground that the secretary of the Maritime Commission had not "knowingly" given the successful bidder or its agent notice of the award.

In the *Purcelle Envelope Co.* case, this Court said: (249 U. S. 318)

"In the present case it is insisted . . . that he (the Postmaster General) has discretion and when exercised it is paramount, his action being 'quasi-judicial', and that therefore it was within his power to review and set aside the decision of his predecessor. We are unable to concede either the fact or the power asserted to be dependent upon it. *There must be a point at which discretion is exhausted. The procedure for advertising for bids for supplies or services to the government would else be a mockery.* . . . By it the government is given the benefit of competition in the market and each bidder is given a chance for a bargain. It is a provision, therefore, in the interest of both government and bidder, necessarily giving rights to both and placing obligation on both. And it is not out of place to say that the government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own (P. 318)

"*And we repeat there must be some point at which discretion ceases and obligation takes place.* That point is defined in the Garfielde case and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims. (P. 319)

"Upon the invitation, in accordance with law . . . the Envelope Company and 11 others submitted bids. The Envelope Company was the lowest bidder, and after the company had been found upon investigation to be financially responsible its bid was accepted by entry of a formal order. . . . Postmaster General Gary went out of office and his successor either by inducement or upon his own resolution entered into a contract with other companies.

"The record furnishes no justification for such action. . . . A great deal is made" (of the fact that subsequent investigation produced a report unfavorable to the financial standing of the company) "and of the fact that the contract was not signed nor the bond of the Envelope Company approved.

> "It makes no difference that the contract was not formally signed or the bond formally approved. . . . Their formal execution, as we have seen, was not essential to the consummation of the contract. *That* was accomplished, as decided in the Garfielde case, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it." (P. 320; stresses and parenthetical matter supplied)

The case of petitioner is identical with the *Purcelle* case with respect to the attempted rescission after acceptance of a bid and entry of the acceptance in the official records. In two other particulars, it is admitted it differs. One of these is favorable to petitioner—the fact that the bond was admittedly not questioned by the government. The other concerns the question as to the manifestation of assent or communication of acceptance which was not in the *Purcelle* case. With respect to the latter point, petitioner urges that the manifestation of assent by the Maritime Commission was so clear and so clearly recorded that *no denial could be made—nor was any denial made*—when the petitioner alleged in the complaint that the bid had been accepted by the Commission and the award of the vessels had been made. *Of course, the Commission could not deny what was spread imperishably and indelibly on its minutes. It was manifest that the bid had been accepted.*

With respect to the procedure of making awards and consummating contracts in competitive bidding, the authority of the *Purcelle* case seems to be definite, clear and completely applicable to the petitioner's case. Bids were opened on October 24 and November 14, 1947 (R. 19). They were studied until January 22, 1948. The Commission had reserved the right to accept or reject. The bids were on forms required by the Commission and were supported, as required by the Commission, by bond of more than $1,000,000. The bidder, under the terms and conditions of the Commission, could not retract his bid and became obligated to perform under bond from the time of the opening

of the bids. The Commission had no limit on the period it could deliberate, and, having deliberated, had the right to reject bids if they were found not satisfactory for any reason. But the Commission, having deliberated, did not avail itself of its alternative and reject the bids on January 22, 1948. It accepted them. At that instant, if the words of the *Purcelle* case and the doctrine of fairness in the process of collective bidding mean anything at all, the government agency had exhausted its period of discretion. At that moment the period of obligation—which had been running for the bidder from the day of the opening of the bids—began for the government.

It is submitted that the *Purcelle* case was completely disregarded by the Court of Appeals in the decision of this case.

II.

District Judge Holtzoff's opinion (R. 10), when deciding on the motions, was adopted by the trial court in finally deciding the case. It contained one statement of law germane to the basic question, which petitioner completely accepts. The Court said:

> "In order that a binding contract may come into being, it was necessary that a notice of acceptance either oral or in writing, or telegraphic or telephonic should have been communicated or *should have been attempted to have been communicated to the plaintiff*. . . ." (Emphasis supplied).

If, when the Commission accepted the bids of the petitioner on January 22, 1948 and entered the acceptance in the record, such entry was not notice, it was surely an attempt by the Commission in the only way open to it, to communicate notice. The simultaneous direction to its proper officers to carry out its action of acceptance admits of no other construction.

Without waiving the point that the entry of the acceptance in the public records was notice of the acceptance of

the bids, petitioner urges that the direction given by the Commission to its proper officers was certainly such an attempt to communicate notice as would satisfy the statement of law of the District Court, which was presumably taken into consideration by the affirmance of the Court of Appeals.

III.

The Administrative Procedure Act of 1946, (*supra*) included many functions in the operation of its Section 3, on public information, which were excluded from the operation of other sections of the Act. Section 2(a) of the Administrative Procedure Act (60 Stat. 238; Title 5 U. S. Code, Section 1001(a)) in defining "agency" excluded from the operation of the act the functions of emergency war agencies but excepted from the exclusion (thereby including) the provisions of Section 3 of the Act regarding public information. Thus the functions performed under the Surplus Property Act were excluded from the operation of all sections of the law, *except Section 3.*

The reason for this exception as to public information is best revealed in the words of the Senate Report on the bill, 1945, P. 8, as follows:

> "The public information provisions of Section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, *all administrative operations* should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency 'housekeeping' arrangements may be involved." (Emphasis supplied).

There is no question of either secrecy or internal housekeeping here.

Pursuant to the Act, the Maritime Commission told the public of its procedure with respect to the sale of government-owned vessels in the Federal Register of September 11, 1946, (11 F. R. 177A-594) as follows:

"Sec. 200.23. Division of Large Vessel Sales. . . .

". . . This Division invites applications for purchase of vessels covered by the Merchant Ship Sales Act of 1946 and bids for non-war built vessels sold for operation, scrap or purposes other than operation, *including Navy LST vessels*. . . . Inquiries concerning bids after their opening and award of vessels should be addressed to Chief, Bid Sales Section. . . . Sales are made pursuant to action by the Commission itself upon recommendations of this Division."

In the same issue of the Federal Register (page 177A-598) the Maritime Commission published the fact that its opinions, orders and public records were available for inspection, especially to persons properly and directly concerned therewith.

Petitioner therefore urges that the Court of Appeals erred in failing to consider the provisions of the Administrative Procedure Act, and the fact that the record of the Commission award was available for public inspection, so that the interested public might have information (and therefor notice) of the contents of such records. If this be so, the Court erred in failing to find that under such circumstances there was no need for the formality of a particularized notice "knowingly" given by the Secretary as an element necessary to consummate a contract.

IV.

Petitioner urged in the appellate court that basic considerations of equitable conduct and fair dealing precluded validation of the Commission's purported rescission of its award on January 23, 1948. The majority opinion in the appellate court took no cognizance of any equities. The petitioner contends here, as this Court found in the *Purcelle* case, that "the record furnishes no justification for such action", meaning the rescission.

Here is the only reason supplied for the rescission, from the minutes of the Commission action of January 23, 1948, (R. 77):

> "Commissioner Mellen moved for reconsideration of the action of January 22, 1948, with respect to LST's. The motion was seconded by Commissioner McKeough. "Commissioner Mellen stated that, *following the* Commission's action of January 22, he further discussed with Mr. Hunter the prices bid under PDX 397, 404, 412 and 418." (These were designations of the Invitations to Bid, of which 397 and 404 are pertinent to this case). "He pointed out that the bids in many cases were as much as $10,000 below other bids for LST's in all sections of the country and that offers of $40,000 each had been made for the purchase of LST's for use as non-self propelled barges."

After the above statement and discussion, the Commission voted for reconsideration and then for rescission of the action of January 22.

The sole argument of petitioner to this point is the following question: "Is the reason given one which furnishes justification for the action?"

V.

The point raised here is a question of the acceptability of two types of evidence. Petitioner contends that (1) affidavits, testimony and sworn statements to the effect that the Secretary of the Commission is the only authorized officer to give notification of awards of LST's are valueless in the face of (2) published procedure of the Commission that inquiries as to such awards be sought elsewhere.

VI.

Section 3(a) of the Administrative Procedure Act of 1946 provides:

> "Every agency shall separately state and currently publish in the Federal Register . . . the established places at which and methods whereby, the public may secure information. . . . No person shall in any manner be required to resort to organization or procedure not so published."

The decision of this case requires the petitioner to resort to a procedure involving the notice of award from the Secretary, "knowingly" given, while the established place at which and the method whereby such information should have been obtained was published by the Commission as by inquiry at the Division of Large Vessel Sales.

VII.

The single, sole and whole defense to petitioner's action below was that no contract existed because the award had been rescinded before the petitioner had been "knowingly" notified of the acceptance of the bids by the Secretary of the Commission, as the only authorized officer who could provide such notification, on behalf of the Commission.

Even this defense could not have been raised had the Secretary proceeded in the normal course of events in accordance with the directions of the Commission to carry its action into effect, since the formality of the telegraphic notification was the sole technicality left to consummate the contract, even under a view most favorable to respondents.

Petitioner urged below that two maxims of Equity had application here. One, that "Equity Will Regard That As Done Which Ought To Have Been Done"; the other, that "Equity Looks To The Substance Rather Than To The Form."

With respect to the first maxim, petitioner quoted Story on Equity Jurisprudence (14th Ed. 1918, Sec. 81) as follows:

> "The true meaning of this maxim is, that equity will treat the subject matter as to collateral consequences and incidents as if the final acts contemplated by the parties had been executed exactly as they ought to have been done, not as the parties might have executed them."

With respect to the second maxim, petitioner quoted the same authority (14th Ed. Sec. 88) as follows:

> "The law looks to the agreement of the parties as it appears on the face of the paper itself and the action will stand or fall upon the strength or weakness of the written instrument."

Thus, it is argued, the U. S. Maritime Commission certainly must have intended to accept the bids and to have the petitioner notified in the normal manner when it took its action of January 22 and gave its directions to its staff. The fact that the Secretary failed to carry out his orders does not change the fact of acceptance, as officially recorded.

The bid was made upon a form required to be used by the Maritime Commission, which incorporated by reference all the terms and conditions contained in the invitation and which contained in the words approved by the Maritime Commission the very wording of the offer that was to be made. Petitioner's offer was actually limited to an insertion of words, (1) describing the petitioner as the bidder, (2) specifying the amounts bid for the respective vessels, identifying the latter, (3) a signature to bind the petitioner and (4) an accompanying bond in the amount of more than $1,000,000 to insure performance in accordance with all the terms and conditions.

This was the instrument upon which action was taken by the Maritime Commission. In fact, there was appended to the same a form of acceptance, which could be signed by the Secretary, if he so desired, (R. 69) completing a formal document which was undeniably a contract. He was directed to carry out the acceptance of the Commission. By signing that document he could have carried it out. *He* decided not to.

Under such circumstances, petitioner argues Equity will consider that the officer did as he was instructed to do, in the formality, and that Equity will look to the instrument prepared by the Commission, submitted by the petitioner,

as hereinbefore outlined, as the substance on which action of acceptance was taken on January 22, 1948.

And under such circumstances, petitioner asks, can it be right or fair to permit the Commission, as a party, to take advantage of a failure and neglect of its officer to act as directed to evade the obligation so undertaken?

VIII.

The Court of Appeals opinion says:

> "The United States Maritime Commission voted on January 22, 1948 to award to appellant corporation and to other bidders some of the surplus ships for which they had bid. It directed its 'proper officers' to take 'all actions necessary and proper to carry the action of the Commission . . . into effect.'" (R. 80)

Thereafter the Appellate Court states:

> "Appellant's bids were of course offers. The resolution of January 22 was a decision to accept some of them. But acceptance of offers involves not only a decision to accept them but a notification to the offeror, and notification, like other legal acts, involves actual or apparent intention. There is no evidence that the Commission or its officers or employees did anything that was or appeared to be intended as a notice to the appellant of the Commission's decision to accept some of its offers." (R. 81).

Petitioner submits that the direction to the officers of the Commission to carry its action into effect and the recording of this direction in its official minutes was, in and of itself, the strongest evidence not only of the intention to accept but of the intention to notify the petitioner of its acceptance. It is submitted that the decision is so self-contradictory as to require correction.

CONCLUSION.

Petitioner therefore believes that the importance of the questions herein raised, the effect of this decision upon the processes of competitive bidding involving the government and the departure of this decision from the established guide supplied by this Court for determining the consummation of contracts resulting therefrom, justifies the prayer for the writ, especially when considered in connection with the provisions of this Court's rule No. 38(5).

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 632

NEW ORLEANS SHIPWRECKING CORPORATION, PETITIONER

v.

WILLIAM W. SMITH, GRENVILLE MELLON, RICHARD PARKHURST, RAYMOND McKEOUGH, AND JOSEPH K. CARSON, JR., ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The oral opinion of Judge Holtzoff on the motions for preliminary injunction and summary judgment (R. 9–11), the pre-trial hearing memorandum of Judge Schweinhaut (R. 12–13), and the opinion, findings of fact and conclusions of law of Judge Bailey of the District Court for the District of Columbia (R. 13–17) are not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 80–81) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1948 (R. 82). The petition for a writ of certiorari was filed on March 7, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a contract to sell government scrap was formed between petitioner and the United States Maritime Commission by the mere entry in the Commission's minutes of its vote to accept some bids of petitioner, although no authorized officer or employee of the Commission knowingly gave notice of acceptance to petitioner before the Commission rescinded its vote on the following day.

2. Whether, assuming the existence of a government contract to sell scrap to petitioner, specific performance will be granted petitioner although (a) the United States is an indispensable party which has not been joined, and (b) title has not passed to petitioner who has an adequate remedy at law.

STATUTE AND REGULATIONS INVOLVED

Section 3 (b) (c) of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002 (b) (c), and pertinent regulations of the United States Maritime Commission issued thereunder, are set forth in Appendix A, *infra*, pp. 20–23.

STATEMENT

On January 30, 1948, petitioner instituted this suit in the District Court for the District of Columbia to enjoin respondents, members of the United States Maritime Commission, from selling certain surplus vessels of the United States. The United States was not joined as a party defendant. Petitioner alleged that a contract of sale for said vessels had been entered into on January 22, 1948, between petitioner and respondents and prayed that the court decree that title be vested in petitioner (R. 2–6). The pertinent facts are as follows:

On September 17, 1947, the Maritime Commission issued Invitation for Bids No. PD–X–397 which listed sixty surplus LST's (Landing Ship Tank) for sale as scrap (R. 52–67). On October 14, 1947, additional surplus LST's were offered for sale as scrap in Invitation for Bids No. PD–X–404 (R. 14). Both invitations provided that bids were to be submitted on a Form of Bid which was attached thereto (R. 67). Also attached was a Form of Acceptance to be executed in the name of the Commission by the Secretary thereof (R. 69). Bids were invited upon the following terms and conditions: Bids could be withdrawn at any time prior to the time fixed for opening (R. 56); the Commission reserved the right to reject any and all bids, call for new bids, waive any irregularity in any bid and make such award or awards as it might deem most advantageous (R.

56); title was to be conveyed by a bill of sale (R. 57); the Buyer assumed all the risks of ownership from the "time of receipt of notice of acceptance of bid" (R. 57); payment of the full purchase price was due on or before delivery to the buyer, but in any event not later than forty days "from date of receipt of notice of acceptance of bid" (R. 57); "each of the vessels will be delivered to the Buyer together with a bill of sale" and delivery had to be accepted within forty days "from the date of receipt of notice of acceptance of bid" (R. 57–58).

On October 24, 1947, and on November 14, 1947, the bids were opened and petitioner's bids were found to be high on nineteen of these vessels (R. 14). On January 22, 1948, the Commission met to consider the recommendations made concerning the sale of these vessels by the Chief of the Large Vessel Sales Division, and unanimously voted to award to petitioner fifteen of the said vessels (R. 15). The Commission thereupon authorized the "proper officers of the Commission" to take any and all actions necessary and proper to carry the action of the Commission into effect (R. 15, 75). Customarily, telegrams were sent out notifying successful bidders of awards to them (R. 15), such telegrams being prepared for the signature of the Secretary of the Commission (R. 33). "No other employee or officer of the Commission other than the Commission itself, had authority to communicate notice of official

commission action." (Finding 12, R. 16.) On this occasion, however, upon the suggestion of a member of the Commission that no formal notice be sent because of his intention to move for reconsideration the next day, the Secretary sent out no notice. He testified that, accordingly, he asked the Chief of the Bureau of Purchases and Sales not to have any notice prepared and not to discuss the matter with anyone (R. 34, 35). On January 23, 1948, the Commission met in session and voted to reconsider and rescind its action of January 22 with respect to, among others, the awards to petitioner (Finding 11, R. 16, 76–78).

On January 22, 1948, one Nathan Siegel, who was employed by petitioner and other firms to keep them informed on the availability of scrap and to report on the status of their bids (R. 15, 25), went to the offices of the Commission to see the Secretary about a matter not connected with petitioner's interests. He learned from an acquaintance, not an employee of the Commission, whom he encountered in a corridor, that the Commission had awarded the LST's in question (R. 15–16). Thereupon, Mr. Siegel went to the office of a Mr. Carter, who was Chief of the Contract Branch of the Large Vessel Sales Division, and subsequently to the office of a Mr. Taylor, an Administrative Assistant to Mr. Carter, whose duties included the preparation of telegrams for the signature of the Secretary, notifying bidders of awards (R. 16). He then

went to the office of the Secretary of the Commission and inquired of him whether it was true that the Commission had finally made the award (R. 16). The Secretary, according to Mr. Siegel's testimony, said, "Yes, * * * I am glad that the matter has been finally disposed of." (R. 27.) The Secretary testified that he did not recall any statement of this nature (R. 35, 38). There was no evidence that the Secretary informed Mr. Seigel as to which vessels, if any, had been awarded petitioner. The trial court found that "The Secretary of the Commission did not deny that the Commission had taken such action" (Finding 9, R. 16). On the following day, January 23, 1948, Mr. Siegel again went to the office of Mr. Taylor and was there informed by a stenographer that she was preparing a telegram to petitioner, notifying it of the awards (Finding 7, R. 16, 48–49). However, said telegram was never sent by the Commission to petitioner (Finding 8, R. 16). "The fact that Mr. Siegel was employed by the plaintiff Corporation was not known to Messrs. Carter, Taylor or Williams [Secretary of the Commission] at the time or times that Mr. Siegel inquired of them as to the action of the Commission" (Finding 10, R. 16). "* * * no person authorized to do so knowingly communicated to the plaintiff notice of the action of the Commission taken January 22, 1948" (Finding 12, R. 16–17).

Upon the filing of the complaint on January 30, 1948, a temporary restraining order was granted, effective until February 6, 1948, and later extended to February 13, 1948. On February 13, 1948, after oral argument, the trial court denied petitioner's motion for a preliminary injunction and respondents' motion for summary judgment, and advanced the case for trial (R. 9–11). On April 13, 1948, the trial court dismissed the complaint and entered judgment in favor of respondents, holding that petitioner's bid was never accepted by the Commission (R. 17). "No contract arose until some member of the Commission or officer or employee of the Commission, with authority to do so, communicated an acceptance of the plaintiff's offer to the plaintiff" (R. 13–14). Notice of appeal was filed on May 12, 1948, but petitioner did not seek an injunction pending appeal. Absent such injunction, said vessels were sold and delivered to other parties and titles thereto transferred.[1] On December 13, 1948, the Court of Appeals for the District of Columbia Circuit affirmed the judgment of the District Court (R. 82).

ARGUMENT

Basically, petitioner contends that, in view of Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, and the decision

[1] See Appendix B, *infra*, pp. 24–25.

of this Court in *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, entry in the minutes of the Maritime Commission of its action taken on January 22, 1948, constitutes notice of acceptance of petitioner's bids. In the alternative, petitioner urges that the courts below erred in finding that only the Secretary of the Commission was authorized to give notification of awards. Petitioner's contentions are plainly in error. The final step necessary to the formation of a contract between petitioner and the United States was the transmission by the Secretary of the Commission to petitioner of a written notification of acceptance. No such notification was forwarded and no contract was formed. We submit, accordingly, that the petition is without merit as a matter of substantive law. Moreover, there are other conclusive obstacles in petitioner's path. Even if respondents did contract to sell to petitioner, the United States is the real party in interest and an indispensable party which has not consented to be sued. Moreover, petitioner has an adequate remedy at law. Finally, we suggest that the present case may be moot. The vessels involved have been sold and delivered to other parties and title thereto transferred. There was, of course, no stay or other injunctive order which forbade such sale.

1. The law applicable to this case was stated in the oral opinion of Judge Holtzoff on peti-

tioner's motion for a preliminary injunction (R. 9–11); it was adopted by Judge Schweinhaut in a pre-trial memorandum (R. 12–13), by Judge Bailey in dismissing the complaint (R. 14–17), and by the Court of Appeals in its affirmance (R. 80–81). "In order that a binding contract may have come into being it was necessary that a notice of acceptance, either oral or in writing, or telegraphic or telephonic should have been communicated, or should have been attempted to have been communicated to the plaintiff,[2] and this communication must have been sent by a person authorized to do so by the Commission" (R. 10).

This result necessarily follows from the general rules of contract law. The mere resolution of a principal to accept an offer, uncommunicated to the offeror by the principal or his authorized agents, does not consummate a contract. Whether such resolution to accept is recorded in the memorandum book of an individual or in the minutes of an association is of no legal significance until there is an actual authorized communication to the offeror. Cf. *Powell* v. *Lee,* 99 L. T. 284, 24 T. L. R. 606 (K. B.); *Smith* v. *Independent School District No. 12,* 108 Minn. 322; *Sears* v. *Kings County Elevated R. Co.,* 152 Mass. 151; *Bankers Trust Co.* v. *Economy Coal Co.,* 224 Iowa 36;

[2] "Petitioner completely accepts" the foregoing statement of the law (Pet. 18).

Kushler v. *Weber,* 182 Mich. 224; 2 Fletcher, *Cyc. of Corporations,* sec. 431. Moreover, acceptance is not accomplished by notice to third parties, not known agents of the offeror, or to agents of the offeree with instructions to inform the offeror. Cf. *Barr* v. *Lapsley,* 1 Wheat. 151; *Harvey* v. *Duffey,* 99 Cal. 401; *New* v. *Germania Fire Ins. Co.,* 171 Ind. 33; *Horton* v. *New York Life Ins. Co.,* 151 Mo. 604; *Felthouse* v. *Bindley,* 11 C. B. (NS) 869, 142 E. R. 1037; 1 Williston, *Contracts* (Rev. ed. 1936), pp. 41, 190, 243.

Petitioner urges, however, that, because of Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002 (*infra,* p. 20), and pertinent regulations of the Commission issued thereunder, the minute entry of the Commission, after its first vote, was a matter of public record and thus was notice of acceptance to petitioner, even though it did not actually know of the award. But, as indicated by the general rules stated above, the law of offer-and-acceptance normally requires not only some overt act by the offeree but also actual communication of the acceptance to the offeror,[3] or, at least, an attempt to communicate by the means specified or authorized

[3] Compare the rationale of the "reward" cases that a claimant is deemed not to have accepted a reward-offer by his performance, unless he actually knew of the published offer to reward. See, *e. g.*, *Williams* v. *West Chicago Street R. R. Co.*, 191 Ill. 610; *Fitch* v. *Snedaker*, 38 N. Y. 248; 1 Williston, *Contracts* (Rev. Ed. 1936), Sec. 33.

in the offer.[4] Accordingly, mere general publication of the acceptance is not adequate notice to the offeror unless such publication was authorized by him. Here, the offer expressly indicates that an individual notice of acceptance, actually communicated to petitioner, was contemplated rather than a general publication to all the world. The Invitation for Bids, which sets forth the terms and conditions upon which petitioner's bids were invited, makes it clear that neither the Commission nor the bidder were to be contractually bound until actual notice of acceptance had been received. The invitation provides that the risks of ownership shall be on the buyer from the time of *receipt* of notice of acceptance, that payment of the purchase price is due on or before delivery to the buyer, but in any event not later than forty days from *receipt* of notice of acceptance, and that delivery of the vessels and the transfer of title are to be accepted within forty days from *receipt* of notice of acceptance (R. 57, 58). It is obvious that, were the situation reversed and the Commission seeking to enforce the alleged contract, petitioner would not contend that publication itself, without actual notice to petitioner, was sufficient.

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[4] If the offeree manifests his acceptance by a method authorized by the offeror, a contract is formed regardless of whether the offeror actually receives the communication. Cf. 1 Williston, *Contracts* (Rev. ed. 1936), Sec. 83 (acceptance by mail).

In any event, assuming that official publication of an acceptance is sufficient notice to the offeror, neither the Administrative Procedure Act nor the Commission's regulations provide that minute entries of the Commission shall be made available to the public at large. Section 3 (b) of the Act provides that "every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases." 5 U. S. C. 1002 (b). Section 3 (c) requires that "matters of official record shall in accordance with published rule be made available to *persons properly and directly concerned*" (emphasis supplied). 5 U. S. C. 1002 (c). The pertinent Commission regulation (46 CFR, 1946 Supp., § 204.1) states that "(a) Pursuant to section 3 (a) and (c), respectively, of the Administrative Procedure Act (60 Stat. 237) there shall be available: (1) for public inspection, all final opinions or orders in the adjudication of cases * * * (2) To *persons properly and directly concerned* therewith, matters of official record * * * (b) Application for inspection of materials covered by paragraph (a) of this section shall be made to the Secretary of the Commission, Washington, D. C., who shall have authority to decide all questions presented by the application" (emphasis supplied) *infra,* pp. 21–22. The Administrative Code of the Commission, Part 63, Files and Records, Sec. 63.7 thereof, made available for examination

at the office of the Secretary by 46 CFR, 1946 Supp., § 200.1 (e), provides in part that "records maintained by the Minutes Section shall be accessible to officers and employees of the Commission on proper identification and for a justifiable reason, and shall not be accessible to persons outside the Commission without the prior approval of the Secretary." *Infra,* p. 22.

We submit that the award of a contract to sell surplus naval vessels does not constitute a "final opinion or order in the adjudication of cases", required to be published or made available to public inspection by the Administrative Procedure Act. The plain import of these words relates to agency action which might be considered as precedents in administrative law.[5] As seen from the statute and the regulations, other matters of official record are not available to the public at large indiscriminately but only to persons properly and directly concerned therewith; permission must be obtained from the Secretary of the Commission before inspection of the minute entries may be had. Even assuming that these minute entries are opinions and orders, "public

[5] "This section [3 (b)] requires that rulings and orders either be published or otherwise made available to public inspection. Since rulings and orders made in the course of adjudication of particular cases are one of the principal sources of administrative law, it is obviously necessary that they be published or made available to public inspection." Sen. Doc. 248, 79th Cong., 2d sess., p. 17. See, also, pp. 198, 199, 225, 256, 357.

inspection" is limited to those securing approval of the Secretary. There is no evidence that petitioner, or its agent, Mr. Siegel, obtained such permission or inspected the minutes prior to rescission of the award on January 23, 1948. That petitioner might have been able to do so before that time does not signify that petitioner was thereby constructively notified.

2. Petitioner also asserts that *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, is authority for the proposition that a contract is formed by entry in the contracting agency's minutes of a resolution to accept a bid, and that the decision below is in conflict therewith. Such a proposition finds no support in the holding of the *Purcell* case. Although there is language that the *Purcell* contract was consummated by entry of the order awarding the contract,[6] such language must be read with regard to the question and the record before the Court, and must also be related back to the rule set forth in *Garfielde* v. *United States*, 93 U. S. 242, which the court in the *Purcell* case viewed as controlling. In the *Purcell* case, a copy of the order of the Postmaster-General awarding the contract to the Purcell

[6] "It makes no difference that the contract was not formally signed or the bond formally approved * * *. Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in the *Garfielde Case*, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it." *Id.* at 319, 320.

Company was mailed to the company by the Third Assistant Postmaster-General prior to the attempt to revoke and cancel the contract (Transcript of Record, *United States* v. *Purcell Envelope Co.*, No. 168, Oct. Term, 1918, Finding V, R. 50, Exhibit D, R. 36). And in the *Garfielde* case, plaintiff was advised in writing by the Second Assistant Postmaster-General that his offer had been accepted. *Garfielde* v. *United States, supra* at 243. In the present action, on the other hand, there was no communication of the Commission's action dispatched to petitioner.

3. In the alternative, petitioner asserts that it obtained information of the acceptance from the Division of Large Vessel Sales, and that the contract was thereby executed because regulations of the Commission provide that inquiries concerning bids after their opening, and award of vessels should be addressed to the Chief, Bid Sales Section. 46 CFR, 1946 Supp., Sec. 200.23, *infra*, p. 21. Petitioner contends therefore, that the courts below erred in finding that only the Secretary or the Commission itself had authority to communicate notice of official commission action (Finding 12, R. 16, 81). However, concurrent findings of fact will not be re-examined by this Court (*Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214, and cases there cited) and, in any case, these findings are amply supported in the record. The regulations of the Commission expressly provide that "The Office of

the Secretary * * * is responsible for appropriate notification of Commission actions." 46 CFR, 1946 Supp., Sec. 200.3, *infra*, p. 21. Section 95.5 of the Administrative Code of the Maritime Commission states that "If an award is made by the Commission, the Director of the Division of Vessel Disposal and Government Aids shall (a) *prepare for the Secretary's signature* a letter notifying the successful bidder of the award * * *." [Emphasis supplied.] *Infra*, pp. 22–23. The Secretary testified that it was his duty to notify both the staff of the Commission and successful or unsuccessful bidders (R. 32, 33). Properly construed, Sec. 200.23, on which petitioner relies, merely channels the incoming mail; reply is made over the signature of the Secretary.

Even assuming that information obtained from the Division of Large Vessel Sales would constitute proper notice of acceptance, such notice was not knowingly given petitioner. None of the employees of the Commission of whom Mr. Siegel, the agent of petitioner, inquired as to the awards knew that he was employed by petitioner (Finding 10, R. 16, 35, 38, 41, 46, 48). As already noted, *supra*, p. 10, notice to third parties is not notice to the offeror. Moreover, petitioner's reliance on 46 CFR, 1946 Supp., Sec. 200.23 (*infra*, p. 21) proves too much. That regulation provides that inquiries should be addressed to the Chief, Bid Sales Section, but Mr. Siegel directed his in-

quiries to Mr. Carter, Chief of the Contract Branch, and Mr. Taylor, his Administrative Assistant (R. 16). Thus, assuming that petitioner is correct in contending that the Secretary was not the only officer authorized to give notice, such information as it obtained did not come from an authorized officer and, therefore, could not constitute notice of acceptance. Cf. *Powell* v. *Lee*, 99 L. T. 284, 24 T. L. R. 606 (K. B.).

4. Even if the Commission, as agent for the United States, entered into a valid contract to sell petitioner the surplus L. S. T.'s in question (R. 65–69), petitioner cannot maintain this suit. Although the United States is not named as a party, the complaint on its face shows that, in all but the defendant's name[7] the suit is, in effect, one to compel specific performance by the United States, which has not consented to be sued.[8] In its prayer for relief, petitioner requests the Court to decree that the award made on January 22, 1948, is valid and still in effect, and that title be vested in petitioner (R. 6). The rule is firmly established that the federal courts have no juris-

[7] In determining whether the suit is against the sovereign, it is, of course, immaterial that the sovereign is not named as a party defendant. *Ex parte New York*, 256 U. S. 490, 500; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371; *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 464.

[8] The Court of Appeals, in view of its holding that there was no contract, found it unnecessary to consider whether this is a suit against the United States (R. 81).

diction to entertain proceedings seeking specific performance of the sovereign's contracts. See Brief for the Petitioner, *Larson* v. *Domestic and Foreign Commerce Corp.*, No. 31, this Term, now pending decision.[9]

5. Even if the complaint should not be dismissed as initiating an unconsented suit against the United States, we believe that equity jurisprudence requires its dismissal on the ground that petitioner has an adequate remedy at law. Assuming that a contract to sell exists, the Invitation for Bids clearly provides that legal title shall be transferred with the delivery of the vessels (R. 57, 58); accordingly, petitioner acquired no title. For breach of the contract to sell, the United States would be liable in damages and could be sued in the Court of Claims. The vessels involved are not unique, having value solely as scrap (R. 53), and petitioner's only loss consists of resale profits (R. 5) which are calculable.

6. Finally, it is respectfully called to the Court's attention that, in the absence of an injunction pending appeal, the vessels here involved were sold and delivered to other parties, titles thereto transferred, and the ships may

[9] Should the *Larson* case be affirmed, we submit that the contractual terms set forth in the instant Invitation for Bids reveal clearly that title was not to pass until delivery of the vessels (R. 57, 58), *supra*, pp. 3–4, and that *Larson*, which involved a contract with different terms, could not, therefore, be controlling here.

already have been scrapped.[10] The present action, therefore, might very well be moot. If the action is not moot, it would seem that the purchasers are indispensable parties who have not been joined.

CONCLUSION

The decision below is clearly correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should, therefore, be denied.

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APRIL 1949.

[10] See Appendix B, *infra*, pp. 24–25.

APPENDIX A

1. Section 3 of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. 1002, provides in part as follows:

> SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—
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> * * * * *
>
> (b) OPINIONS AND ORDERS.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.
>
> (c) PUBLIC RECORDS.—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

2. Pertinent regulations of the United States Maritime Commission, 46 CFR, 1946 Supp., Part 200 *et seq.*, provide in part as follows:

> § 200.1 *Organization and functions of the United States Maritime Commission.*
>
> * * * * *
>
> (e) The Commission's complete organization, together with its procedures, both general and with relation to internal affairs

is set out in the Commission's "Administrative Code", which is available for examination at the office of the Secretary in Washington, to whom should be addressed inquiries as to the most expeditious method of handling specific matters with the Commission.

* * * * *

§ 200.3. *Secretary.*—The Office of the Secretary (through 9 sections) prepares the Commission's agenda and minutes of Commission's meetings, and is responsible for appropriate notification of Commissions actions; * * *

§ 200.23. *Division of Large Vessel Sales.*— * * * This division invites application for purchase of vessels covered by the Merchant Ship Sales Act of 1946, and bids for non-war built vessels sold for operation, scrap or purposes other than operation, including Navy L. S. T. vessels. Requests for inclusion on mailing lists may be made to the Executive Assistant, Division of Large Vessel Sales. Inquiries concerning bids after their opening, and award of vessels should be addressed to the Chief, Bid Sales Section. The sale of vessels under the Merchant Ship Sales Act of 1946 is publicly announced.

§ 204.1. *Opinions, orders, and public records available for inspection.*—(a) Pursuant to section 3 (a) and (c), respectively, of the Administrative Procedure Act (60 Stat. 237) there shall be available:

(1) For public inspection, all final opinions or orders in the adjudication of cases (except those held by the Commission for good cause to be confidential and not cited as precedents), and all rules;

(2) To persons properly and directly concerned therewith, matters of official

record, except as otherwise required by statute, and except information held confidential for good cause found.

(b) Application for inspection of materials covered by paragraph (a) of this section shall be made to the Secretary of the Commission, Washington, D. C., who shall have authority to decide all questions presented by the application (52 Stat. 964, sec. 12, 60 Stat. 244; 46 U. S. C. 1114, 5 U. S. C. Sup. 1011) [G. O. 63, Aug. 27, 1946, effective Sept. 11, 1946, 11 F. R. 177A–598].

3. Administrative Code for the Maritime Commission, adopted Mar. 29, 1946, effective April 24, 1946:

§ 63.7. *Records maintained by Minutes Section.*

(a) *Accessibility.*—Formal summaries of action taken by the Commission shall be prepared, and an index digest thereof maintained, by the Minutes Section, Office of the Secretary. Records maintained by the Minutes Section shall be accessible to officers and employees of the Commission on proper identification and for a justifiable reason, and shall not be accessible to persons outside the Commission without the prior approval of the Secretary.

(b) *Certified copies.*—Where certified copies of Commission actions or other documents are required for court or other purposes, application shall be made to the Office of the Secretary. Upon proper identification, and justification for the request, the Minutes Section shall cause a copy to be prepared in proper form.

§ 95.5 *Notification of Award.*—If an award is made by the Commission, the Di-

rector of the Division of Vessel Disposal and Government Aids shall (a) prepare for the Secretary's signature a letter notifying the successful bidder of the award, and calling attention to terms and conditions of the award; (b) notify the Division of Finance for Construction to return to the unsuccessful bidders their good-faith checks; and (c) notify the General Counsel of the award, requesting the General Counsel to prepare a bill of sale for the vessel, to be delivered to the successful bidder upon payment of the balance due and delivery of the vessel.

APPENDIX B

UNITED STATES MARITIME COMMISSION,
Washington 25, D. C., March 8, 1949.

The Honorable THE ATTORNEY GENERAL:

Re: *New Orleans Shipwrecking Corporation, Appellant* v. *William W. Smith, Grenville Mellon, Richard Parkhurst, Raymond McKeough, and Joseph K. Carson, Jr., Appellees*—United States Court of Appeals for the District of Columbia Circuit.

DEAR SIR: With regard to your inquiry as to the status of the vessels involved in the above action, please be advised that they have all been sold subsequent to February 13, 1948, pursuant to appropriate action of the United States Maritime Commission, and title to all these vessels has passed from the United States of America to the purchasers of the vessels. These vessels are described as follows:

LST–874	LST–968	LST–1053
LST–915	LST–984	LST–1139
LST–930	LST–989	LST–119
LST–942	LST–1019	LST–571
LST–949	LST–1023	LST–740

Except for a temporary restraining order forbidding the sale of the above vessels issued by the United States District Court for the District of Columbia on January 30, 1948, as continued by order issued by the same Court on February

6, 1948, which expired by its own terms on February 13, 1948, there has never been any order, injunction or other action taken by the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit or by any other Court forbidding, restraining or in any other way interfering with the sale of these vessels by the United States Maritime Commission.

Very truly yours,

(S) PAUL D. PAGE, JR.,
Solicitor.

U. S. GOVERNMENT PRINTING OFFICE: 1948